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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 286

THE NEW YORK CENTRAL RAILROAD COMPANY, AS OWNER OF THE CARFLOAT "No. 37", PETITIONER,

vs.

TUG "TALISMAN", THE LONG ISLAND RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 5, 1932

CERTIORARI GRANTED OCTOBER 17, 1932

(36,983)

(36,983)

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK CENTRAL RAILROAD COMPANY, as Owner of the Carfloat "No. 37", Libellant-Appellee,

vs.

Tug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY, Claimant-Appellant

STATEMENT

1928.

June 27. Filed libel and stipulation for costs.
July 25. Filed claim and stipulation for costs and value.
Aug. 11. Filed order amending libel (paragraph No. 6). Goddard, J.
Sept. 12. Filed answer of Long Island Railroad Company.
" 15. Filed note of issue and notice of trial—Oct.

1929.

Dec. 20. Filed order substituting Burlingham, Veeder, Fearey, Clark & Hupper.

1931.

Mar. 12. Before Knox, J.—case called—to be submitted to the Court on an agreed statement of facts.
" 28. Filed stipulation of facts.

[fol. 2]

June 30. Filed opinion—Decree for libellant, Knox, J.
July 21. Filed interlocutory decree with reference to Anthony V. Lynch—Knox, J.
" 24. Filed notice of appeal.
" 25. Filed petition and order allowing appeal. Patterson, J.
" 25. Filed assignment of errors.

IN UNITED STATES DISTRICT COURT

LIBEL

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The Libel of The New York Central Railroad Company, as owner of carfloat "No. 37" against the tug "Talisman",

her engines, boilers, etc., in a cause of collision, civil and maritime, alleges on information and belief, as follows:

First. Your libellant is and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business located at No. 6 Beaver Street, in the Borough of Manhattan, City, County and State of New York, and the owner of the carfloat "No. 37", which up to the time of the occurrence hereinafter described was tight, staunch, strong and in all respects seaworthy and properly manned and equipped.

[fol. 3] Second. The tug "Talisman" is now and will be during the pendency of process hereunder within this District and within the jurisdiction of the United States and of this Honorable Court.

Third. On the 29th day of October, 1926, the New York Central carfloat "No. 37" lay moored in bridge No. 6 at the Long Island Railroad Terminal, Long Island City, light. At about 1:35 A. M. on said 29th day of October, 1926, the Long Island Railroad Tug "Talisman" in shifting N. Y. C. float "No. 58" into bridge No. 5 so negligently and so carelessly executed the manœuver as to come into contact with the said N. Y. C. carfloat "No. 37", which contact resulted in damage to the said N. Y. C. carfloat "No. 37".

Fourth. The aforesaid collision and resulting damage were not caused through any fault, neglect and want of care on the part of this libellant or the carfloat "No. 37", or those in charge of her, but were caused solely through the fault, neglect and want of care on the part of the tug "Talisman" and/or those in charge of her, in the following respects, among others, which will be pointed out at the trial of this action:

1. In that those in charge of the tug "Talisman" were careless and inattentive to their duties.

2. In that they failed to maintain a good and sufficient lookout.

[fol. 4] 3. In that they negligently and carelessly caused a contact with the N. Y. C. carfloat "No. 37".

4. In that they failed to exercise any or ordinary precautions to prevent the contact.

5. In that they did nothing to avoid the collision.

Fifth. By reason of the premises herein alleged libellant has sustained damages as nearly as the same can now be estimated in the sum of $2,250.00, no part of which has been paid although duly demanded.

Wherefore libellant prays that process in due form of law, according to the course and practice of this honorable Court in causes of Admiralty and Maritime jurisdiction, issue against the said tug "Talisman", her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer all and singular the matters aforesaid; that this honorable Court be pleased to decree to your libellant its damages, with interest and costs, and that the tug "Talisman", her engines, etc., be condemned and sold to satisfy the same, and that your libellant may have such other and further relief as in law and justice it may be entitled to receive.

Bingham, Englar & Jones, Proctors for Libellant.
Office & P. O. address: No. 64 Wall Street, New York City.

[fol. 5] *Duly sworn to by F. N. Melius. Jurat omitted in printing.*

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AMENDING LIBEL—Aug. 11, 1928

Upon the annexed consent and on motion of Bingham, Englar & Jones, proctors for libellant, it is hereby

Ordered that the libel filed herein on the 27th day of June, 1928, be, and the same hereby is, amended so as to add thereto a paragraph numbered "Sixth" as follows, to be inserted immediately before the Wherefore Clause of said libel:

[fol. 7] Sixth. All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Henry W. Goddard, U. S. D. J.

We hereby consent to the entry of the foregoing order. Dated New York, August 10, 1928.

Burlingham, Veeder, Masten & Fearey, Proctors for Claimant.

[fol. 8] In United States District Court

Answer

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of The Long Island Railroad Company, owner and claimant of steamtug Talisman, as proceeded against upon the amended libel of The New York Central Railroad Company, in a cause of collision, civil and maritime, alleges:

First. Claimant denies that it has any knowledge or information sufficient to form a belief as to the allegations of the first article of the amended libel.

Second. Claimant admits the allegations of the second article of the amended libel.

Third. Claimant admits that on October 29, 1926, carfloat New York Central No. 37 was lying in No. 6 bridge, Long Island City; that about 1:35 A. M. the Talisman brought float No. 58 into collision with No. 37. Claimant denies the other allegations of the third article of the amended libel.

Fourth. Claimant denies the allegations of the fourth article of the amended libel.

Fifth. Claimant admits demand and non-payment and denies the other allegations of the fifth article of the amended libel.

[fol. 9] Sixth. Claimant admits the Admiralty and Maritime jurisdiction of the United States and of this Honor-

able Court, and denies the other allegation of the sixth article of the amended libel.

Seventh. Further answering, claimant alleges that the facts are as follows:

About 1.35 A. M. on October 29, 1926, the Talisman had float New York Central No. 58 in tow on her starboard side, and was engaged in shifting No. 58 into No. 6 bridge, Long Island City. The Cutchogue was lying on the end of Deck 3. Carfloat New York Central No. 37 was lying light in No. 6 bridge. Weather was clear, tide flood, wind S. W. In attempting to keep clear of the Cutchogue, the Talisman brought the starboard forward corner of No. 58 into collision with No. 37.

Eighth. The collision and consequent damage were not caused or contributed to by any fault or negligence on the part of the Talisman or those in charge of her, but were due solely to the negligence of carfloat New York Central No. 37, in the following respects among others:

1. No. 37 was unseaworthy.

2. No. 37 was old and weak and not fit to withstand reasonable contact to be expected in harbor navigation.

3. No. 37 was not in a proper berth.

[fol. 10] 4. No. 37 was not in charge of a competent person.

Ninth. Further answering, claimant alleges that on or about July 31, 1920, claimant by registered letter notified libellant that on and after September 1, 1920, it would cease to be responsible for vessels lying at its terminals, Long Island City, and Bay Ridge, Brooklyn, and that all floating equipment at these terminals, particularly carfloats, would be at the risk of the vessel, float or craft, and that claimant would not be responsible for any damage received by said floating equipment whether the damage arose through the negligence of it or its employees or through other causes, and that the notice applied to all floats, whether in charge of a floatman or not, while moored at its terminals at Long Island City or Bay Ridge, Brooklyn. No reply to this communication has ever been received by respondent from libellant.

At the time of the collision herein alleged between float New York Central No. 58 and float New York Central No. 37, the latter float was lying at claimant's terminal at Long Island City under the terms of the above mentioned letter, and she was there at her own risk, and claimant accordingly is not liable for any damage sustained by No. 37.

All and singular the premises are true.

Wherefore claimant prays that the amended libel herein may be dismissed with costs.

Burlingham, Veeder, Masten & Fearey, Proctors for Claimant. W. Y. Cherry.

[fol.11] *Duly sworn to by W. Y. Cherry. Jurat omitted in printing.*

[fol. 12] In United States District Court

[Title omitted]

Stipulation of Facts

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto, as follows:

1. That the collision referred to in the libel and answer herein between New York Central carfloat No. 58 in tow of the Long Island Railroad Company tug Talisman and New York Central carfloat No. 37 which was lying moored in bridge No. 6 of the Long Island Railroad Terminal at Long Island City was occasioned solely by reason of the negligence of the said tug Talisman and/or those in charge of her.

2. That the libellant sustained damages as a result of the said collision, the nature and amount of the damages to be determined at a reference in the event of a decision in favor of the libellant.

3. That both the libellant New York Central Railroad Company and the claimant Long Island Railroad Company, [fol. 13] owner of the tug Talisman are and at the time of this accident were common carriers engaged in interstate commerce. The claimant Long Island Railroad Company

received said carfloat No. 37 at said claimant's terminal at Long Island City in connection with transportation in interstate commerce of freight cars and freight.

4. That the allegations contained in Article First of the libel herein are admitted by the claimant.

5. That libellant duly received by registered mail from claimant the notice dated July 31, 1920, referred to in Article Ninth of the answer herein and that libellant made no reply thereto. Said notice reads as follows:

"We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn.

On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City and Bay Ridge, Brooklyn: All vessels, floats, craft or any kind of floating equipment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.

This company will not be responsible for any damage [fol. 14] received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes.

This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn."

Yours very truly, H. L. Des Anges, Marine Superintendent.

Dated New York, March 27, 1931.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Claimant.

[fol. 15] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK CENTRAL RAILROAD COMPANY, Libellant,

against

Steamtug TALISMAN, LONG ISLAND RAILROAD COMPANY, Claimant

Appearances:

Messrs. Bigham, Englar, Jones & Houston (Leonard J. Matteson and Charles A. Van Hagen, Jr., of Counsel), Proctors for Libellant;

Messrs. Burlingham, Veeder, Fearey, Clark & Hupper (Chauncey I. Clark and Paul Tison, of Counsel), Proctors for Claimant.

OPINION, KNOX, D. J.

KNOX, D. J.:

The facts in this case are very simple. On October 29, 1926, libellant's carfloat No. 37 lay moored in Bridge No. 6 at claimant's Long Island City Terminal. It was there in connection with transportation of freight in interstate commerce. Claimant's tug Talisman in shifting another carfloat brought it into collision with No. 37, with resultant in-[fol. 16] jury to the latter. It is stipulated that the collision was occasioned solely by the negligence of the Talisman. It is also stipulated that upon an unspecified date libellant duly received from claimant a notice dated July 31, 1920, which reads as follows:

"We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn.

On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City and Bay Ridge, Brooklyn: All vessels, floats, craft or any kind of floating equipment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.

This company will not be responsible for any damage received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes.

This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn."

Libellant never replied to the notice and the question before the Court is whether claimant, in seeking to avoid liability for its own negligence, has successfully done so. [fol. 17] This point was presented to the City Court of the City of New York in the case of The Patchogue, 1926 A. M. C. 45, and it was there held that the defendant, Long Island Railroad Company, could not exempt itself from liability by merely sending out such a notice. The Court said, at page 48:

"The plaintiff in the instant case could not go to any float terminal which it might select. It was obligated to go to the specific terminal belonging to the defendant Long Island Railroad Company. Under such circumstances the law wisely dictates to defendant that it legally cannot exempt itself from liability in damages, since plaintiff required a service from it as a carrier which no other party could furnish. Unlike to towage cases, there was no freedom of contract. Plaintiff, willy-nilly in the instant case, had to deal with defendant at its terminal. Defendant was acting as a common carrier pure and simple, in the service rendered to floats with freight cars."

While this decision is not binding here, it is very apt, and is entitled to respectful consideration, notwithstanding the cases of The Cutchogue, 10 Fed. (2d) 671, and Ten Eyck v. Director General of Railroads, 267 Fed. 974, upon which claimant strongly relies. The last mentioned decision holds that the owners of the tugs there concerned had relieved themselves from liability for negligence by having sent out notices to the effect that towage contracts to be performed by the tugs should be executed at the risk of the tows. The [fol. 18] theory was that the receipt of such notices by the

owners of the vessels to be towed, and their apparent acquiescence therein, resulted in the inclusion of the limitation of the tug's liability in the contracts between the parties. It is my opinion that this line of decisions does not rule the instant case. In the towage cases, there was no compulsion on the part of the towed vessels to accept the terms offered them, and a tug, with respect to its tow, is not a common carrier. Here, however, the situation is altogether different. Both libellant and claimant are common carriers in the transportation of interstate commerce, and libellant, in the discharge of the duty it owes to the public, is compelled to send its boats to the terminal which claimant is required by law to maintain for the interchange of interstate traffic. Furthermore, claimant was under an obligation to receive such freight as might be delivered to the terminal by libellant; and, during such reasonable periods of time as the proper and usual facilities of carrying freight to the terminal were on claimant's property, the same were, in the absence of specific agreement to the contrary, entitled to common law protection from the negligent acts of the claimant. A mere ipse dixit to the contrary in an effort by claimant to shift its responsibility to afford reasonable, proper and equal facilities for the interchange of traffic to another carrier should not be permitted to serve that purpose, and libellant may have a decree.

John C. Knox, U. S. D. J.

Dated New York, N. Y., June 30, 1931.

[fol. 19] In United States District Court

The New York Central Railroad Company, as Owner of the Carfloat "No. 37", Libellant,

against

Tug "Talisman", Long Island Railroad Company, Claimant

Interlocutory Decree—July 17, 1931

This cause having duly come on for trial and having been heard on the pleadings and proofs of the respective parties,

and having been submitted by the advocates for the respective parties, and due deliberation having been had thereon, and the Court having rendered its decision in writing holding the tug "Talisman" solely at fault, it is

[fol. 20] Now, on motion of Bigham, Englar, Jones & Houston, proctors for the libellant herein,

Ordered, adjudged, and decreed that the libellant, The New York Central Railroad Company, as owner of the carfloat "No. 37", recover of and from the steamtug "Talisman", her engines, boilers, etc., her claimant and stipulators for costs and value its damages sustained by reason of the matters and things set forth in the libel herein with interest and costs, and that the said vessel be condemned therefor, and it is further

Ordered that it be referred to Anthony V. Lynch, Esq., Commissioner, to ascertain and compute the amount of the libellant's damages and to report thereon to this Court with all convenient speed.

John C. Knox, U. S. D. J.

[fol. 21] In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that the claimant, The Long Island Railroad Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the interlocutory decree entered in the above entitled cause in the office of the Clerk of this Court on the 21st day of July, 1931, and from each and every part thereof.

Dated New York, N. Y., July 23, 1931.

Yours, etc., Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Claimant.

[fol. 22] To Charles Weiser, Esq., Clerk of the United States District Court, Southern District of New York; Messrs. Bigham, Englar, Jones & Houston, Proctors for Libellant, 64 Wall Street, New York, N. Y.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

Claimant, The Long Island Railroad Company, being aggrieved by the decision of the United States District Court for the Southern District of New York filed herein, and by [fol. 23] the interlocutory decree entered thereon in the office of the Clerk of this Court on the 21st day of July, 1931, hereby prays that an appeal be allowed to the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, N. Y., July 23, 1931.

The Long Island Railroad Company, by Burlingham, Veeder, Fearey, Clark & Hupper, Proctors, by Chauncey I. Clark.

IN UNITED STATES DISTRICT COURT

ALLOWANCE OF APPEAL

Upon the foregoing petition, it is

Ordered that the appeal herein prayed for by claimant, The Long Island Railroad Company, be and the same hereby is allowed.

Dated New York, N. Y., July 24, 1931.

Robert P. Patterson, U. S. D. J.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

The claimant, The Long Island Railroad Company, appellant herein hereby assigns error in the opinion, findings and decree of the District Court of the United States for the Southern District of New York as follows:

1. In that the Court held claimant liable for damages sustained by libellant's carfloat No. 37.

2. In that the Court held that there was no contract relieving claimant from liability for negligence.

3. In that the Court held that claimant's letter of July 31, 1920, was a "mere ipse dixit".

4. In that the Court held that claimant's letter of July 31, 1920, was "an effort by claimant to shift its responsibility to afford reasonable, proper and equal facilities for the interchange of traffic to another carrier".

[fol. 25] 5. In that the Court held that the line of decisions including The Cutchogue, 10 Fed. (2) 671 and Ten Eyck v. Director General of Railroads, 267 Fed. 974, did not rule the instant case.

6. In that the Court held that the situation in the instant case was altogether different from the situation in The Cutchogue, supra, and Ten Eyck v. Director General of Railroads, supra.

7. In that the Court held that libellant had no freedom of contract because it was bound to send its float to claimant's terminal and claimant was bound to receive it.

8. In that the Court failed to hold that a contract existed between libellant and claimant relieving claimant from liability for negligence.

9. In that the Court failed to hold that claimant's letter of July 31, 1920, constitued a contract binding on the parties.

10. In that the Court failed to hold that The Cutchogue, supra, and Ten Eyck v. Director General of Railroads, supra, ruled the instant case.

11. In that the Court failed to follow the ruling of this Court in The Cutchogue, supra, and Ten Eyck v. Director of Railroads, supra.

12. In that the Court failed to hold that libellant had acquiesced to the terms stated in claimant's letter of July 31, 1920.

[fol. 26] 13. In that the Court failed to hold that libellant had freedom of contract in that libellant could have towed its floats away from claimant's terminal as soon as they were unloaded and/or loaded.

14. In that the Court directed a decree in favor of libellant.

15. In that the Court failed to direct a decree in favor of claimant dismissing the libel.

Dated New York, N. Y., July 23, 1931.

Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Claimant.

[fol. 27] In United States District Court

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated September —, 1931.

Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Appellant. Bigham, Englar, Jones & Houston, Proctors for Appellee.

[fol. 28] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 29] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1931

No. 274

Argued February 18, 1932. Decided April 4, 1932

The New York Central Railroad Company, as Owner of The Car Float No. 37, Libelant-Appellee,

v.

The Tug Talisman, The Long Island Railroad Company, Claimant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

From an interlocutory decree in admiralty that the libelant, New York Central Railroad Company, recover dam-

ages done to its car float No. 37, through the fault of the tug Talisman, belonging to the Long Island Railroad Company, the latter company appeals. Reversed.

Burlingham, Veeder, Feary, Clark & Hupper, of New York City (Chauncey I. Clark and Paul Tison, both of New York City, of counsel), for claimant-appellant Long Island R. Co.

Bigham, Englar, Jones & Houston, of New York City (Leonard J. Matteson and Charles A. Van Hagen, Jr., both of New York City, of counsel), for libelant-appellee New York Cent. R. Co.

Purdy & Purdy, of New York City (William F. Purdy and John E. Purdy, both of New York City, of counsel), for Erie R. Co. amici curiæ.

OPINION

AUGUSTUS N. HAND, Circuit Judge:

This is an appeal from an interlocutory decree in admiralty holding the steam tug Talisman, belonging to claimant Long Island Railroad, liable for damages sustained by the car float No. 37, belonging to New York Central Railroad. No. 37 was moored at claimant's terminal in Long Island City, East River, and was damaged by New York Central car float No. 58 in tow of claimant's tug Talisman. The collision and damage occurred on October 29, 1926, and was caused solely through the negligence of the tug Talisman while engaged in shifting No. 58 to a point at the same terminal where No. 37 was moored.

On July 31, 1920, libelant received a notice from the Long Island Railroad by registered mail stating that:

"On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City, and Bay Ridge, Brooklyn: All vessels, floats or any kind of floating equipment, lying at the Long Island Railroad terminal, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.

"This company will not be responsible for any damage received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through

the negligence of this company and/or its employees or through other causes."

There was no proof of any objection on the part of the New York Central to the terms outlined in the foregoing notice, although it does not appear what, if any, use it made of the Long Island Railroad's terminal between September 1, 1920, and the time of the collision.

[fol. 30] The trial judge held that the notice did not suffice to relieve the tug Talisman from liability, for the reason that it could not contract against its own negligence.

Both railroads at the time of the accident were common carriers engaged in interstate commerce, and the claimant received car float No. 37 at its terminal at Long Island City in connection with transportation in interstate commerce of freight cars and freight. In such circumstances a notice imposing the conditions under which floating equipment would be received justified the Long Island Railroad Company in receiving the equipment at its terminal upon the conditions specified in the notice in the absence of some statute or rule of public policy prohibiting a contract against its own negligence.

It cannot be said that, because the notice was an old one, given six years before, it had no efficacy. Railroads must certainly be deemed to have in mind formal notices that are served upon them. It is probably the fact that the New York Central had sent many car floats to the Long Island Railroad terminal in the interval between the service of the notice and the date of the accident. But in any event, if any inference might be drawn from proof that it did not, an absence of dealing or other presumptive abandonment of the terms specified in the notice should have been shown by the libelant. As the matter stands, we have a notice giving the terms upon which the Long Island Railroad would receive floating equipment at its terminal and when the New York Central sent its car float there it must be regarded as having accepted the offer to receive it upon the terms indicated. Ten Eyck v. Director General (C. C. A.) 267 F. 974; The Cutchogue (C. C. A.) 10 F. (2d) 671; Sun Oil Co. v. Dalzell Towing Co. (C. C. A.) 55 F. (2d) 63.

The situation is quite different from that in McWilliams Bros. v. Davis (C. C. A.) 285 F. 312, where a notice had

been served by the Director General as operator of the Pennsylvania Railroad, stating that all towing of barges would be done at the risk of the tow, and that neither the tugs nor the Director General would be responsible for any damage done through negligence of the masters and crews of the tugs while engaged in the towage service. McWilliams Bros., who owned the barges in that case, served a notice declining to accept any limitation of ordinary liability for towage. We held that, where the Director General undertook to perform a towage service for McWilliams Bros. after receipt of the notice from it declining to accede to limitation of liability, the contract was made without reference to the limitation clause. In the present case, however, there was no objection to the terms of the notice, and the New York Central was accordingly in the position of one accepting an offer to receive its equipment without liability for negligence.

The question in the present case is whether the carrier was free to make such conditions as to liability as it thought best. If it was, there was a good contract, and the Long Island Railroad Company is not liable. Baltimore & Ohio, etc., Railway v. Voigt, 176 U. S. 498, 20 S. Ct. 385, 44 L. Ed. 560; Owen McCaffrey's Sons v. Director General (D. C.) 282 F. 728; McCormick v. Shippy (C. C. A.) 124 F. 48; Long v. Lehigh Valley R. R. Co. (C. C. A.) 130 F. 870; Graves v. Davis, 235 N. Y. 315, 139 N. E. 280; Foreign T. & M. Co. v. Moran T. & T. Co., 56 F. (2d) —, decided by us April 4, 1932.

Ten Eyck v. Director General (C. C. A.) 267 F. 974, and The Cutchogue (C. C. A.) 10 F. (2d) 671, were towage cases where the carrier, sought to be held liable irrespective of its attempt to limit liability for its own negligence, was regarded as within its rights because the barge was not obliged to obtain the service. The distinction drawn by the trial court relied on the fact that the New York Central was obliged to go to the terminal and the Long Island Railroad Company was obliged to receive the New York Central float and to furnish it terminal facilities. The claimant, therefore, was thought to be in a position similar to that of a common carrier dealing with a passenger or shipper of freight. But the rule limiting the right of a common carrier to contract against its own negligence in dealing with passengers and shippers does not

necessarily apply to dealings between connecting carriers, who are in many aspects treated as equals, neither of which is entitled to any special privileges or protection in the making of contracts. Central R. Co. of New Jersey v. Anchor Line (C. C. A.) 219 F. 716.

Under Interstate Commerce Act, § 3, par. 3, 49 U. S. C. A. § 3 (3), carriers engaged in the transportation of passen- [fol. 31] gers or property must afford reasonable facilities for the interchange of traffic between their respective lines. Under section 3, par. 4, 49 U. S. C. A. § 3 (4), "if the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, * * * on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

Under section 3, par. 4, of the Interstate Commerce Act, connecting carriers are at liberty to agree upon "terms" for the use of terminal facilities. By reason of the notice received by the New York Central without comment, we must hold that it acquiesced in the "terms" indicated in the notice, and that, when it sent its car float to the terminal, it contracted that the Long Island Railroad should be free from liability for damages suffered through the latter's negligence.

The meaning of the word "compensation" in paragraph 4 might be restricted to charges to be paid for furnishing "terminal facilities." But the word "terms" is broad, and naturally includes everything which may be regarded as a consideration for affording these facilities, including in the present case a relinquishment of claims against the Long Island Railroad for damages occasioned by the not unlikely negligent operations of its tugs about the entrance to the terminal. We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which "terminal facilities" were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them. It contracted without an appeal to the Commission. The act plainly

contemplates that it may do this. Having done so, it is in a similar position to that of the owners of the floating equipment in Ten Eyck v. Director General (C. C. A.) 267 F. 974, and The Cutchogue (C. C. A.) 10 F. (2d) 671, where the railroads had given notice that they would not be liable for injuries arising from negligent towage or shifting.

It cannot be said that the Long Island Railroad furnished no consideration for affording terminal facilities, because it was obliged to furnish them in any event. It was not obliged to furnish them upon any terms, for, if the Central had refused to accede to its proposal, it could have appealed to the Commission. When it agreed upon terms, it gave up that right. We find nothing in the record indicating that the "terms" were not freely agreed upon by the two carriers, though they would have been open to revision if libelant had declined to accede to the arrangement. In such circumstances no rule of public policy is involved. The common law does not inhibit the contract, and the Interstate Commerce Act recognizes the right to make it. If Congress had intended further limitations upon the power to contract, it would doubtless have imposed them. Accordingly, the parties are in a position where, as was said in Gooch v. Oregon Short Line R. R. Co., 258 U. S. 22, 42 S. Ct. 192, 193, 66 L. Ed. 443, Congress must have been "satisfied to leave them to the Interstate Commerce Commission and the common law."

The New York Central has proved no cause of action against the tug Talisman. The decree is accordingly reversed, with costs, and the cause remanded, with directions to dismiss the libel.

[fol. 32] In United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the courtrooms, in the Post Office building, in the city of New York, on the 11th day of April, one thousand nine hundred and thirty-two.

NEW YORK CENTRAL RAILROAD COMPANY, Libellant-Appellee,

v.

Steam Tug "TALISMAN", LONG ISLAND RAILROAD COMPANY, Claimant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

DECREE—Filed April 12, 1932

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed, with costs and cause remanded with directions to dismiss the libel.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 33] [File endorsement omitted.]

[fols. 34-39] Petition for rehearing, covering six pages, filed May 3, 1932, omitted from this print. It was denied, and nothing more by order of May 12, 1932.

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Leonard J. Matteson, for the Petitioner.

OPINION ON PETITION FOR REHEARING—Filed May 5, 1932

Per CURIAM:

Petition denied.

L. H., T. W. S., A. N. H., United States Circuit Judges.

[fol. 41] [File endorsement omitted.]

[fol. 42] In United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 12th day of May, one thousand nine hundred and thirty-two.

[Title omitted]

Order Denying Rehearing—Filed May 11, 1932

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 43] [File endorsement omitted.]

[fol. 44] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 45] Supreme Court of the United States

Order Allowing Certiorari—Filed October 17, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,983. U. S. Circuit Court of Appeals, Second Circuit. Term No. 286. The New York Central Railroad Company, as owner of the carfloat "No. 37", petitioner, vs. Tug "Talisman", the Long Island Railroad Company. Petition for a writ of certiorari and exhibit thereto. Filed August 5, 1932. File No. 36,983.